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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 71A03-0603-CR-140
	)	
KELLY FOWLER,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0506-FA-34

April 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

The State of Indiana appeals from the trial court's grant of Kelly L. Fowler's motion to suppress evidence. On appeal, the State raises a single issue, which we restate as whether the trial court abused its discretion in granting Fowler's motion based on its finding that the stop and search of the vehicle driven by Fowler was unreasonable. Concluding that the police action was reasonable and that the trial court abused its discretion in granting the motion, we reverse.

Facts and Procedural History

The facts most favorable to the trial court's findings and judgment are that on June 14, 2005, police officers Jeffrey Giannuzzi and Kathy Fulnecky were conducting surveillance at a hotel on a matter unrelated to this case. Officers Giannuzzi and Fulnecky were wearing street clothes and were in an unmarked vehicle. At one point, two cars arrived at the hotel, one driven by a woman later determined to be Fowler, and one by a man later determined to be Carlton Robertson. As Fowler entered the hotel, Officer Giannuzzi focused his attention on Robertson, whom he observed open the car door and dump tobacco out of a cigar, refill the cigar with some other substance, and then re-roll the cigar and lick it. As Officer Giannuzzi testified, it is a common practice among marijuana users to empty a cigar and refill it with marijuana, thereby creating a "blunt." Fowler then returned from the hotel and entered Robertson's vehicle. Robertson drove away, but returned in a matter of seconds, and Robertson and Fowler switched seats so that Fowler was driving.

As Fowler drove away from the hotel, she made a right hand turn without signaling.[1] Either Officer Giannuzzi or Officer Fulnecky summoned a uniformed officer via radio[2] and instructed him to pull over the vehicle. Officers Giannuzzi and Fulnecky followed Fowler's vehicle until the marked police vehicle arrived, approximately three miles later.

The officer in the marked vehicle pulled Fowler over, and while the uniformed officer approached the driver's side door, Officer Giannuzzi approached the passenger's side. Officer Giannuzzi testified that he immediately smelled marijuana and saw a foam cup with a cigar sticking out of it. The officers then instructed both Fowler and Robertson to exit the vehicle. Officer Fulnecky then brought her K-9 partner, Pepper, a trained narcotics dog, from her vehicle. Pepper indicated that he detected narcotics on the driver's side of the car. After entering the car, Pepper indicated that narcotics were in the center console and in a bag on the back seat. Officers found marijuana in the console and cocaine in the bag.

The State charged Fowler with dealing cocaine, a Class A felony, and possession of cocaine, a Class C felony. Fowler filed a motion to suppress the evidence obtained against her on the grounds that it was obtained pursuant to an illegal search of the vehicle. The trial court held an evidentiary hearing on February 16, 2006. The State filed a "Motion to Permit State to Re-Open Evidence on Motion to Suppress" on February 28, 2006. In this motion, the State sought to introduce testimony of Officer Giannuzzi indicating that after re-reading

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[1] Fowler testified that she did use her turn signal. The Officers testified that they observed Fowler make a right hand turn without signaling. The trial court entered a finding that Fowler failed to properly signal a right hand turn. Appellant's Appendix at 16.

[2] Both officers testified that they believed the other had radioed the uniformed officer.

his report of the incident, he realized that he had erroneously testified as to the location of Fowler's failure to signal. The trial court denied this motion, indicating, "the Court has found, as will be indicated in its order concerning the defendant's Motion to Suppress, that the traffic violation occurred at the intersection [identified in Officer Giannuzzi's report and by Officer Fulnecky's testimony]." Appellant's App. at 14. The trial court issued an Order granting the motion on March 2, 2006. The trial court's Order included the following conclusions:

> 1. The defendant failed to properly signal a right hand turn, as is required by I.C. 9-21-8-25.
> 2. Based upon the defendant's commission of a traffic infraction, the officers following her could have properly conducted a traffic stop immediately upon observing the violation.
> 3. The Court notes that although the officers following the vehicle at the time the traffic infraction was committed[] could not have arrested the driver or issued a traffic citation, as to do so would be in violation of I.C. 9-30-2-2 because they were not operating a clearly marked police vehicle or wearing a distinctive uniform and badge of authority, they could have stopped the motor vehicle and summoned a uniform police car to issue the citation. James v. State, 622 N.E.2d 1303 (Ind. Ct. App. 19[9]3).
> 4. Further, had a lawful and reasonable traffic stop been made at that location, the subsequent search of the automobile, for the narcotics, the circumstances would have been reasonable and permitted. Myers v. State, 839 N.E.2d 1146 (Ind. 2005).
> 5. However, the Court concludes that following the automobile for approximately 3 miles after the driver committed a traffic infraction, under the circumstances as testified to, and then conducting a traffic stop, was not for the express purposes of a traffic stop, but rather as a part of the continuing narcotics investigation which began when the officers made their initial observation of the defendant.
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> Accordingly, the stop and subsequent search, under the facts testified to, were not reasonable and the defendant's Motion should be and is granted.

Id. at 16-17. The State now appeals.

Discussion and Decision

I. Standard of Review

When reviewing a trial court's ruling on a motion to suppress, we must determine whether substantial evidence of probative value supports the trial court's decision. State v. Quirk, 842 N.E.2d 334, 340 (Ind. 2006). Where a trial court granted a motion to suppress, the State appeals from a negative judgment and must show that the trial court's grant of the motion was contrary to law. State v. Carlson, 762 N.E.2d 121, 125 (Ind. Ct. App. 2002). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court. Id. We will not reweigh the evidence or judge witnesses' credibility, and will consider only the evidence most favorable to the trial court's ruling. State v. Friedel, 714 N.E.2d 1231, 1235 (Ind. Ct. App. 1999). As in this case, when the trial court enters findings and conclusions along with its order, we will accept the trial court's factual findings unless they are clearly erroneous. Id.

II. Trial Court's Grant of the Motion to Suppress

A. Conflicts in the Evidence

Fowler argues that we are restrained from reversing the trial court's grant of summary judgment because the evidence is not without conflict. In support of this argument, Fowler points to discrepancies between the testimony regarding Fowler's failure to signal. Specifically, Officer Giannuzzi testified that Fowler failed to use her traffic signal when

exiting the hotel parking lot.[3] Officer Fulnecky, on the other hand, testified that Fowler's failure to signal occurred at the light Fowler encountered immediately after exiting the hotel parking lot. Fowler testified that she used her signal.

We agree with Fowler that our general standard of review when addressing a trial court's grant of a motion to suppress dictates that we will not reverse unless the evidence is without conflict. However, in this case, the trial court entered findings and conclusions and specifically found that Fowler committed a traffic infraction at the location testified to by Officer Fulnecky. It is the province of trial courts to weigh the credibility of witnesses, and the trial court in this case chose to believe Officer Fulnecky's testimony. See Hines v. State, 514 N.E.2d 296, 297 (Ind. 1987) (indicating that it was the province of the trial court to believe the police officer's testimony over the defendant's). Our standard of review dictates that we accept a trial court's factual findings unless they are unsupported by the evidence. Because the trial court specifically found that Fowler committed a traffic violation, and because this finding was supported by evidence, the conflict between the testimony of the Officers and Fowler does not, in itself, preclude reversal of the trial court's grant of the motion to suppress.

B. Indiana Code section 9-30-2-2

The trial court found that Officers Giannuzzi and Fulnecky could have legally stopped the vehicle driven by Fowler immediately upon observing the traffic violation, and then summoned a uniformed officer to issue the citation. The State argues that this finding

[3] As indicated above, the State attempted to re-call Officer Giannuzzi so that he could testify that the

indicates that the trial court misinterpreted Indiana Code section 9-30-2-2, which provides:

> A law enforcement officer may not arrest or issue a traffic information and summons to a person for a violation of an Indiana law regulating the use and operation of a motor vehicle on an Indiana highway or an ordinance of a city or town regulating the use and operation of a motor vehicle on an Indiana highway unless at the time of the arrest the officer is:
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> (1) wearing a distinctive uniform and a badge of authority; or
> (2) operating a motor vehicle that is clearly marked as a police vehicle;
>
> that will clearly show the officer or the officer's vehicle to casual observations to be an officer or a police vehicle. This section does not apply to an officer making an arrest when there is a uniformed officer present at the time of the arrest.

Initially, Fowler raises the issue that this statute may not even apply, as Officers Giannuzzi and Fulnecky were wearing badges and were in a vehicle that was equipped with sirens and lights. However, the statute requires that officers are "wearing a distinctive uniform and a badge of authority." Id. (emphasis added); see Davis v. State, 858 N.E.2d 168, 172 (Ind. Ct. App. 2006) (officer who was wearing a hooded sweatshirt, jeans, a vest that said "POLICE," and a badge did not satisfy the uniform requirements of Indiana Code section 9-30-2-2); Bovie v. State, 760 N.E.2d 1195, 1198 (Ind. Ct. App. 2002) (officer wearing badge, but not uniform, did not satisfy statutory requirement). It is undisputed that Officers Giannuzzi and Fulnecky were not wearing distinctive police uniforms, and that their vehicle was not "marked," but merely equipped with lights and a siren. Therefore their conduct falls under the statute.

The trial court and Fowler cite James v. State, 622 N.E.2d 1303 (Ind. Ct. App. 1993),

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violation occurred at the location identified by Officer Fulnecky.

for the proposition that although this statute prohibits police officers from conducting full-fledged arrests, officers not in uniform may properly conduct investigatory stops. In James, a panel of this court focused on the statutory definition of "arrest": "the taking of a person into custody, that he may be held to answer for a crime." Id. at 1307 (quoting Ind. Code § 35-33-1-5). The James court went on to state:

> Although the stop of a vehicle is a detention, and thus an arrest in a technical sense, it is not a "taking of a person into custody." It would arguably have been better if Officer Windbigler called for the assistance of a uniformed police officer in making the stop; however, the stop itself was not an arrest as defined in I.C. 35-33-1-5 and used in I.C. 9-30-2-2.

Id.

Although this language in James does support the trial court's finding that Officers Giannuzzi and Fulnecky could have properly conducted an investigatory stop, two of our decisions since James have criticized and declined to follow this part of its holding. In Bovie, we focused on Indiana Code section 9-30-2-2's purpose: "to protect drivers from police impersonators and to protect officers from resistance should they not be recognized as officers." 760 N.E.2d at 1199. We then recognized that the risks inherent with an investigatory stop are identical to those inherent in an arrest, and that under Indiana Code section 9-30-2-2 "there is no difference between an actual 'arrest' or an investigatory stop." Id. Therefore, we held that an officer neither wearing a uniform nor driving a marked car could not properly conduct a stop based on a traffic violation. Id.

Similarly, in Davis, 858 N.E.2d 168, we focused on the inherent danger when officers not wearing uniforms conduct traffic stops. We held that the officer in that case "was

precluded from conducting a traffic stop and effectuating either an arrest or simply an investigatory stop based on his lack of uniform and marked police vehicle." Id. at 172.

We agree with the rationale of Bovie and Davis. The purpose of Indiana Code section 9-30-2-2 is to ensure that when officers come into contact with citizens on the roadways, citizens are aware that they are dealing with a police officer. It is the contact with the officer, not the fact of an arrest or citation that causes the danger. See Maynard v. State, 859 N.E.2d 1272 (Ind. Ct. App. 2007), trans. denied (where there was no contact between police officer and citizen, and the officer filed charges against the defendant on a bench warrant after observing the citizen commit a traffic offense, Indiana Code section 9-30-2-2 did not apply). We conclude that the trial court's finding that the officers, who were not in uniform or operating a marked vehicle, had the authority to conduct a traffic stop is clearly erroneous.

C. Pretextual Stops

It is well-established that an officer may stop a vehicle upon observing a traffic violation. Osborne v. State, 805 N.E.2d 435, 439 (Ind. Ct. App. 2004), trans. denied. As discussed above, the trial court found that Fowler committed a traffic violation when she failed to properly signal a right hand turn, and Officers Giannuzzi and Fulnecky observed this violation. The trial court's findings indicate that it determined that the stop and search in this case was not reasonable based in part on the fact that the purpose for the stop was to continue a narcotics investigation and not to issue the traffic ticket. It is well established that the pretextual nature of a stop does not render it unconstitutional under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 814 (1996) ("We think these cases

foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."). Fowler concedes this point, but argues that the stop and search in this case are unreasonable under Article 1, Section 11 of the Indiana Constitution. However, our supreme court has made clear that there is "nothing unreasonable in permitting an officer, who may have knowledge or suspicion of unrelated criminal activity by the motorist, to nevertheless respond to an observed traffic violation." Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001). Therefore, the fact that the officers in this case were primarily concerned with Fowler's potential violation of narcotics laws does not make the stop of the vehicle for a traffic violation unreasonable.

The trial court's findings also indicate that the fact that the stop occurred three miles after the traffic violation contributed to its conclusion that the stop and search were not reasonable. We fail to see how this delay makes the traffic stop unreasonable. As we have previously stated, "[w]e can find no authority for the proposition that police may execute a traffic stop only within a certain proximity to the scene of the violation, nor can we conceive of a rationale for creating such a rule." Lark v. State, 755 N.E.2d 1153, 1156 (Ind. Ct. App. 2001), modified on other grounds on reh'g, 759 N.E.2d 275. We also note that on the facts of this case, Officers Giannuzzi and Fulnecky radioed for a marked car when they observed the traffic violation. Thus, the delay in pulling over the vehicle was attributable to the time needed for the marked vehicle to respond, not to intentional delay on the Officers' part. We conclude that the interval between the Officers' observation of the traffic violation and the subsequent stop does not render the stop and search unreasonable.

D. Reasonableness of the Stop and Search

The officers observed a traffic violation and radioed for a marked police vehicle to make the stop, which was effected in roughly three miles. As discussed above, this procedure was reasonable, as Officers Giannuzzi and Fulnecky were not in uniform and were therefore precluded from conducting a proper stop. The Officers' behavior conformed with the holdings in Davis and Bovie, and with the statement in James that the better course for an officer not in uniform is to summon a uniformed officer to effect the stop. We conclude that the stop of the vehicle was reasonable, and that the trial court's conclusion that it was not is clearly erroneous.

With regard to the subsequent search of the vehicle, the trial court specifically found that if the stop had occurred immediately upon the Officers' observation of the violation, the subsequent search of the automobile would have been reasonable. When determining whether a search and seizure is unreasonable under the Indiana constitution, we must determine whether the procedure was reasonable under the totality of the circumstances. Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). In making this determination, we engage in a three part balancing test considering: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizens' ordinary activities, and 3) the extent of law enforcement needs." Id. at 361.

In Myers v. State, 839 N.E.2d 1146, 1154 (Ind. 2005), our supreme court held that a search of a vehicle occurring after a legal traffic stop and subsequent dog sniff was

reasonable under the Indiana constitution. As in Myers, there was a high degree of certainty that the vehicle contained contraband, as Officer Giannuzzi smelled marijuana upon approaching the vehicle, and a trained narcotics dog indicated that the vehicle contained narcotics. Also, as in Myers, Fowler was present during the automobile search, not under arrest, and therefore, "free to drive [the] vehicle away and dispose of the contraband contained within." Id. Therefore, the needs of law enforcement weigh in favor of concluding that the search was reasonable. Lastly, we recognize that a search of an automobile inherently involves some intrusion into a citizen's activities. However, given the high degree of certainty that the vehicle contained narcotics, and the needs of law enforcement, we conclude that the search was reasonable given the totality of the circumstances.

Conclusion

We conclude that the trial court erroneously interpreted Indiana Code section 9-30-2-2, and improperly considered the pretextual nature of the stop in concluding that the stop and search was unreasonable. The trial court's conclusion that the stop and search was unreasonable was clearly erroneous and therefore an abuse of discretion.

Reversed.

BAKER, C.J. and DARDEN, J., concur.